02-783 (4)

No. 02-763

Supreme Court, U.S.
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In The
Supreme Court of the United States

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,

Petitioner,

v.

TENNESSEE REGULATORY AUTHORITY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

BellSouth Advertising and Publishing Company (BAPCO) publishes a telephone directory that includes the names and numbers of all customers of BellSouth Telecommunications, Inc. (BellSouth) and competing telephone companies. The Tennessee Regulatory Authority (TRA) ordered BAPCO to include on the front cover of the directory the logos and names of all telephone companies with customers in the directory. Did the Tennessee Supreme Court err in holding that the TRA's order did not violate the Free Speech Clause of the First Amendment?

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The decision of the Tennessee Supreme Court is reported at 79 S.W.3d 506. Appendix to BAPCO's Petition for Writ of Certiorari, 1a-30a (Pet. App.) The decision of the Tennessee Court of Appeals (Pet. App. 31a-144a) is reported at 2001 WL 134603. The decisions of the TRA are reported at 1998 Tenn. PUC LEXIS 15 and 1998 Tenn. PUC LEXIS 17.

JURISDICTION

The Tennessee Supreme Court entered its judgment in this case on July 2, 2001. BAPCO filed a timely petition for rehearing, which the Tennessee Supreme Court denied on August 21, 2002. BAPCO invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law abridging the freedom of speech."

STATEMENT OF THE CASE

I. Introduction

This case concerns whether the TRA, a state regulatory agency, may require BAPCO, a subsidiary of BellSouth, to include the names and logos of competing local telecommunication providers on the front cover of the

white pages directory published by BAPCO. The Tennessee Supreme Court found that the TRA's order did not violate the Free Speech rights of BAPCO under the First Amendment. *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority*, 79 S.W.3d 506, 521 (Tenn. 2002) ("we hold that the TRA's orders survive *Zauderer* scrutiny and consequently are valid under the First Amendment") (Pet. App. 1a-30a).

II. Dissolution of American Telephone and Telegraph Company

This commercial speech case has its origins in the breakup of the Bell Telephone monopoly in 1984, accomplished under federal antitrust laws to ensure that developing competitive long-distance carriers could enjoy efficient and nondiscriminatory interconnection with local telephone monopolies. *See generally United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982) (entering consent decree to break up Bell System as of January 1, 1984), *aff'd, Maryland v. United States*, 460 U.S. 1001 (1984). Twelve years after the dissolution of Bell Telephone into AT&T and the seven Regional Bell Operating Companies ("Baby Bells"), Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Federal Telecommunications Act), to promote competition for local telecommunication services and deregulate local telecommunications services nationwide. The Federal Telecommunications Act eliminated the monopoly position in local telephone service held by all seven Baby Bells since the breakup of the parent corporation in 1984. In particular, the Federal Communications Commission (FCC) was required to adopt all regulations necessary to implement telecommunications competition nationwide

within six months of its enactment. 47 U.S.C. § 251(d)(1) (1996).

Anticipating the adoption of the Federal Telecommunications Act, the Tennessee General Assembly enacted its own Telecommunications Act in 1995, which replaced the state laws granting monopolies to existing local telephone service providers with new statutes designed to permit and foster competition in all telecommunication markets. 1995 Tenn. Pub. Acts, ch. 408 (Tennessee Telecommunications Act) (found at Tenn. Code Ann. § 65-4-123 (Supp. 2002)). Likewise, Tenn. Code Ann. § 65-4-123 (Supp. 2002) requires existing local telephone service providers, known as incumbent local telephone exchange companies, to furnish other providers nondiscriminatory interconnection to their public networks.

III. White Pages Directories

Long before the adoption of the Federal and Tennessee Telecommunications Acts, white pages telephone directories were "traditionally an integral part of local telephone service." *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority*, 2001 WL 134603 *19 (Tenn. Ct. App. 2001) (Koch, J., concurring), *rev'd, BAPCO*, 79 S.W.3d at 521. These directories, which included the names, addresses and telephone numbers of customers in a particular area, provided a convenient and inexpensive way for people to obtain numbers in order to make local telephone calls. *Id.*

In 1968, the Tennessee Public Service Commission, the predecessor state agency to the TRA, adopted a regulation requiring AT&T, which was with few exceptions the only long distance and local telephone company available

to customers in Tennessee, to publish a white pages directory specifying that certain information must be included in the directory. Tenn. Admin. Reg. 1220-4-2-.15. In part relevant this litigation, the regulation states:

> The name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover. Information pertaining to emergency calls such as for the police and fire departments shall appear conspicuously in the front part of the directory pages.

Id. This regulation is the center of the dispute in this case.[1]

IV. Administrative Proceedings before the TRA

On December 16, 1996, AT&T filed a Petition Seeking a Declaratory Order as to the applicability of various provisions of the Tennessee Telecommunications Act and Tenn. Admin. Reg. 1220-4-2-.15 to the white pages telephone directory published on behalf of BellSouth by BAPCO.[2] In its Petition, AT&T requested:

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[1] It should also be noted that 47 U.S.C. § 271(c)(2)(B)(viii) of the Federal Telecommunications Act provides that any Baby Bell such as BellSouth that seeks to enter the long distance market must list customers of competing local exchange carriers, such as AT&T, in its white pages directory. BellSouth gained approval to enter the long distance market last year.

[2] Obviously, AT&T filed this petition in response to the adoption of the Tennessee Telecommunications Act in 1995 and the Federal Telecommunications Act in 1996 as AT&T by this time was only a long distance service provider in competition with other long distance

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> [T]he TRA issue a declaratory order declaring that telephone directories are an essential aspect of the telephone or telecommunications services of telephone utilities such as [BellSouth]; and that the covers of directories, published and distributed by BAPCO on behalf of [BellSouth] which include the names and numbers of customers of AT&T, must be nondiscriminatory and competitively neutral, and either must include the name and logo of AT&T in like manner to the name and logo of [BellSouth], or include no company's name and logo, including 'BellSouth'. . . .

AT&T Admin. Rec., Vol. I, p. 10. Several other competing telephone companies intervened in the AT&T case including MCI and NextLink. After discovery and a hearing on the merits, the TRA issued a declaratory order on March 19, 1998. The Chair of the TRA made the following statements in an oral ruling that was later transcribed into the declaratory order:

> As a regulator in Tennessee, I am bound by the parameters of federal law, state law and existing rules of this Agency. However, I am also charged with the duty of promoting telecommunications competition in this state according to the [state and federal] Telecommunication Act[s] of 1995 and 1996, and with the duties of protecting the interest of both consumers and the utility providers. Sometimes the fulfillment of all of these duties conflicts, not only with each other but with the applicable laws involved. I feel that the

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service providers and did not provide any local telephone service in Tennessee.

> production of one complete phone book containing the names and numbers of all customers, promotes competition, reduces consumer confusion and best serves the needs of Tennessee. I feel this solution of one complete directory fulfills my policy goals and I would encourage this action to be taken by the parties involved.

(Pet. App. 147a-148a)

As to the placement of names and logos of AT&T and other competing local telephone carriers whose customers' names are listed in the directory, the Chair of the TRA stated:

> I feel that it is important to note that this rule was created in 1968, long before the 1996 Telecommunications Act and the push for competition. Keeping this in mind, and realizing that no more than one utility existed at the time of this statute to address, I believe that the plain language of the rule envisions the name of the utility whose customers are inside the directory. Following the same logic, then, I believe that if more than one utility's customers are inside the same directory, then more than one utility's name would be on the cover. I do not believe that I have the authority to allow a telephone book with no name on the cover.

(Pet. App. 150a). In effect, the TRA reinterpreted its own rule to now effectuate the goals of the 1995 Tennessee Telecommunications Act of fostering competition among competing local telephone companies by requiring BellSouth, which has the overwhelming share of the local telephone market in Tennessee, to include the names and logos of its competitors on the cover of a single directory published by its subsidiary BAPCO.

V. State Appellate Review of the TRA Declaratory Order

BAPCO appealed the TRA decision to the Tennessee Court of Appeals by filing a Petition for Judicial Review. After briefing and oral argument, the Tennessee Court of Appeals reversed the TRA declaratory order on February 16, 2001. The intermediate state appellate court found that the TRA was "without authority under present [state] statutes and rules to compel BAPCO to brand its 'White Pages' directory cover with the name and commercial logo of AT&T or any other telecommunications service provider who provides basic, local exchange telephone service." (Pet. App. 54a). Judge William Cain, in his opinion for the Court, would have pretermitted the First Amendment issue; however, since Judge William Koch, in a concurring opinion, did address the First Amendment claim, Judge Cain concurred in that opinion. *Id.* In his concurring opinion, Judge Koch stated:

> [T]he TRA's March 19, 1998 order can be upheld only if the TRA has some compelling justification for its order. I find no such justification in this case. Even if promoting competition in accordance with Tenn. Code Ann. § 65-4-123 could be considered a compelling justification, the TRA's order is more extensive than necessary to advance that interest.

(Pet. App. 80a) (Koch, J., concurring).[3] The dissent by Judge Patricia Cottrell did "not address the issue of First

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[3] Quite clearly, Judge Koch's assertion that the State must set forth a "compelling justification" for the TRA declaratory order applies the incorrect level of scrutiny. Under "strict scrutiny," which is applicable to

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Amendment protections against forced commercial speech." (Pet. App. 144a) (Cottrell, J., dissenting).

The Tennessee Supreme Court reversed the intermediate state appellate court on both the jurisdictional and First Amendment issues. (Pet. App. 1a-30a). As to the First Amendment, the Tennessee high court determined that this Court's analysis in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) applied. Specifically, the Tennessee court held that "the TRA's orders are reasonably related to the state's substantial interest in preventing deception of consumers and . . . that the orders under review directly advance the state's interest without imposing an excessive burden." (Pet. App. 28a)[4]. Even though the TRA argued to the Tennessee Supreme Court that its declaratory order passed the four-prong test in *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557 (1980), the Court did not directly address that issue in its opinion.

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political and religious but not commercial speech, the government must justify restrictions on speech with a "compelling state interest." *Burson v. Freeman*, 504 U.S. 191 (1992). On the other hand, the regulation of commercial speech only requires an intermediate level of scrutiny, *i.e.*, a "substantial state interest." *Edenfiled v. Fain*, 507 U.S. 761 (1993).

[4] The Tennessee Supreme Court found that the two-prong test of *Zauderer* was met in this case. First, the Court made a specific finding that "BellSouth is compelled to disclose information which will prevent consumers from mistakenly believing that no alternative providers of telecommunication services are available." (Pet. App. 26a). Second, the Court held that "[g]iven the significant weight of the governmental interest and the relatively narrow impact of the orders in this case, we conclude that the TRA's orders are not unduly burdensome." (Pet. App. 28a).

REASONS FOR DENYING THE WRIT

I. BAPCO Has Failed to Demonstrate the Existence of Any Conflict among the Lower Courts Regarding the Relationship between *Central Hudson* and *Zauderer*.

BAPCO contends (Pet. 12-20) that certiorari should be granted to resolve an alleged conflict between the decision below and decisions of other courts concerning the correct standard under this Court's commercial speech jurisprudence for evaluating the constitutionality of compelled disclosure requirements that are not intended to correct statements "likely to mislead absent the disclosure." (Pet. 16) Specifically, according to BAPCO, the opinion below is contrary to decisions of the Second and Eleventh Circuits, and of the Minnesota Supreme Court, which reserve *Zauderer's* "reasonable relationship" test only for those compelled disclosure requirements necessary to prevent consumer deception but which apply the more exacting *Central Hudson* test to compelled speech requirements that are otherwise motivated. The conflict alleged by BAPCO is illusory.

BAPCO's argument is built entirely upon a mischaracterization of the opinion of the Tennessee Supreme Court. Contrary to BAPCO's repeated assertion that the rationale underlying the TRA's order is unrelated to any need to prevent consumer confusion, the Tennessee Supreme Court made an express finding that the disclosures compelled by the TRA order serve a legitimate purpose precisely because they are intended to "prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available" in the local exchange market, save BellSouth. (Pet. App. 26a). And that finding was central to the Tennessee court's choice of

Zauderer from among this Court's commercial speech cases as supplying the correct standard of review. Thus, the decision below is fully consistent with *Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000), in which the Eleventh Circuit declined to apply the more lenient *Zauderer* standard because the state bar rule there under consideration did ***not*** operate to dispel consumer confusion either in purpose or effect.

Petitioner's reliance upon *State v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882 (Minn. 1992) is likewise unavailing. In *Casino Mktg.*, the Minnesota Supreme Court, utilizing *Central Hudson*, struck down a provision of state law requiring that telemarketers employ live operators to make disclosures before playing tape-recorded solicitations to consumers over the telephone, because the court found that the live operator rule bore "little relationship to . . . [the statute's] fraud deterrence features." *Id.* at 888. However, applying *Zauderer*, the Minnesota Court also concluded that the compelled disclosures themselves, as opposed to the requirement that they be delivered by a live operator, did not offend the First Amendment, because their content was designed "to minimize the opportunity for fraud." The *Casino Mktg.* opinion does not intimate that the court either demanded or relied upon proof of actual fraud prevention in order to sustain the required disclosures. There is, accordingly, no conflict between the decision below and *Casino Mktg.* concerning either the circumstances under which this Court's *Zauderer* test is properly invoked or how that test is to be applied.

Finally, petitioner's discussion of two cases from the Second Circuit – *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996), and *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001),

cert. denied, 122 S.Ct. 2358 (2002) – does not demonstrate any conflict among the lower courts warranting this Court's intervention. To the extent those decisions are inconsistent with each other, and BAPCO asserts they are, they represent a mere intra-circuit split that affords no basis for certiorari review. *Davis v. United States*, 417 U.S. 333, 340 (1974). Moreover, neither of those cases conflicts with the opinion of the Tennessee Supreme Court here. The compelled disclosure requirement struck down in *International Dairy Foods Ass'n* required dairy manufacturers to specially label milk products derived from cows treated with synthetic growth hormones so as to inform consumers of that fact. Like the Eleventh Circuit in *Mason*, the Second Circuit tested the requirement under *Central Hudson* rather than *Zauderer*, because its asserted purpose was merely to provide consumers with additional information about the product involved, rather than, as in this case, to dispel consumer confusion that might arise absent the compelled disclosure. In any event, as petitioner concedes, the Second Circuit later modified *International Dairy Foods Ass'n* in *National Electrical Manufacturers Ass'n*. Petitioner's characterization of the holding of the latter case – "that *Zauderer* applies to all compelled commercial disclosures, whether or not the disclosure has the purpose of preventing deception" (Pet. 20) – cannot be said to conflict with the Tennessee Supreme Court's application of *Zauderer* in a case where a purpose to dispel consumer confusion has been found to justify the compelled commercial speech requirement under consideration.

II. Even If *Zauderer* Does Not Apply, Plenary Review Is Inappropriate Because the TRA Order Passes Both the Reasonable Relationship Test under *Zauderer* and the Intermediate Scrutiny Test under *Central Hudson*.

Even if there were a conflict among the lower courts regarding the relationship between *Zauderer* and *Central Hudson*, this case would not present an appropriate vehicle for resolving the dispute, because the TRA's order plainly satisfies the tests articulated by this Court in both cases. There can be no doubt that the TRA order passes muster under *Zauderer*. Until the passage of the Tennessee Telecommunications Act in 1995 and the Federal Telecommunications Act in 1996, BellSouth maintained a monopoly on local telephone service in Tennessee, and it effectively continues to do so in most areas of the state today. Given the TRA's mandate under the new legal regime "to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications service markets," Tenn. Code Ann. § 65-4-123 (Supp. 2002), that agency now has a clear responsibility to dispel the lingering misperception among consumers that BellSouth remains their sole source of local exchange service.

As the court below correctly recognized, the TRA's requirement that the names and logos of other service providers appear on the front cover of the white pages directory is reasonably related to the achievement of that important objective. The incumbent local exchange carrier after deregulation – BellSouth – is legally obligated to distribute a single, comprehensive white pages directory for each of its service areas to all telephone customers, including those of its competitors, that lists the names and

numbers of all such customers. TRA Declaratory Order, p. 8 (March 19, 1998) (Pet. App. 153a)[5]. Not surprisingly, BellSouth raises no objection to that state-compelled communication. By requiring that the logos of all service providers appear on the front cover of BellSouth's universally distributed telephone book, the TRA has chosen an effective means of making consumers aware in the new competitive environment that they are no longer forced to purchase service from a single monopoly carrier, a misperception that would only be reinforced if their telephone directories continued to bear only the name and logo of that single carrier.

Nor can it be argued that the TRA's logo requirement is "unduly burdensome." *Zauderer*, 471 U.S. at 65. The TRA's order does not require BellSouth to tout the services of its competitors but merely to communicate the fact of their existence. And, as petitioner recognizes (Pet. 4), it has voluntarily chosen to print on the cover of each directory that the book "[i]ncludes customer listings for all telecommunications companies." Thus, any incremental "harm" to BellSouth's commercial interests caused by the additional disclosures commanded by the TRA order will be *de minimis* at worst. In sum, the Tennessee Supreme Court correctly found that both prongs of *Zauderer*'s "reasonable relationship" test have been met.

Contrary to petitioner's assertion (Pet. 25-26), so too are the third and fourth prongs of the *Central Hudson* test

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[5] 47 U.S.C. § 271(c)(2)(B)(viii) of the Federal Telecommunications Act states that any Baby Bell, such as BellSouth, that seeks to enter the long distance market must list customers of competing local exchange carriers, such as AT&T, in its white pages directory listing.

fully satisfied, although the Tennessee Supreme Court saw no need to analyze the TRA's order under *Central Hudson*.[6] As set forth above, the logo display requirement "directly and materially advances" the TRA's interest in fulfilling its statutory mandate to make consumers aware that they now have a choice of local exchange service carriers. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999). And, because the TRA order's efficacy in accomplishing this important objective is a matter of "simple common sense," respondent is not required by *Central Hudson* and its progeny to demonstrate that completely obvious proposition empirically. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). Furthermore, the commercial speech compelled by the TRA's order is "no more extensive than necessary" to achieve its underlying purpose. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188. The order requires only that the identifying logo and name of competing carriers appear on the cover of the telephone book. BellSouth is not compelled to say anything, either on the cover or elsewhere in the book, regarding the price or quality of the services offered by its competitors. The order thus reflects a "fit" that is "reasonable" between the TRA's legitimate regulatory goals and the means chosen to achieve them. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). That is all *Central Hudson* requires.

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[6] Petitioner does not argue that the TRA's order fails the other elements of *Central Hudson*. (Pet. 25)

III. The Decision Below Does Not Conflict with Either *Pacific Gas & Electric* or *United Foods*.

BAPCO's claim (Pet. 26-30) that the decision below is contrary to *Pacific Gas & Electric Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), is without merit. The TRA's order does not even remotely implicate the First Amendment right of corporate speakers not "to propound political messages with which they disagree" that was recognized in *Pacific Gas & Electric*. The speech compelled by the TRA's order is a simple proposition of fact with which no one can disagree, namely, that there exist companies other than BellSouth which now offer local telephone exchange service in the areas where BellSouth formerly enjoyed a monopoly. Thus, there can be no claim here that the TRA's order either "penalizes the expression of particular points of view" by BellSouth or creates an impermissible "pressure to respond" to a message with which BellSouth disagrees, the vices that unconstitutionally infected the California regulation at issue in *Pacific Gas & Electric*. 475 U.S. at 9, 15-16.

Nor does the TRA's order force BellSouth to endorse a commercial message with which it legitimately takes issue, in violation of the principles animating *United Foods*. The problem with the advertising subsidy program struck down in *United Foods* was that it forced a brand-name mushroom producer to endorse the message "that mushrooms are worth consuming whether or not they are branded," in direct conflict with the producer's belief that its own brand of mushrooms was superior to all others. 533 U.S. at 411. Here, by contrast, the message conveyed by the disclosures ordered by the TRA is not a matter of

opinion but is indisputably true. The TRA's logo requirement forces BellSouth only to disclose the existence and identities of its competitors in the local telephone exchange services market. But BellSouth is not forced to state any views with respect to the quality or value of the services offered by those competitors, or even to endorse the value of competition itself. While BellSouth undoubtedly would prefer consumers to think that it maintains its historic monopoly over local telephone service, *United Foods* itself expressly recognized the validity of compelled disclosure requirements whose purpose is "consistent with the State's interest in 'preventing deception of consumers.'" 533 U.S. at 416 (quoting *Zauderer*, 471 U.S. at 651). As demonstrated above, the court below reasonably concluded that the TRA order was necessary to "prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available" in the local exchange market. (Pet. App. 26a). In sum, the Tennessee Supreme Court correctly recognized in this case that, notwithstanding the protections afforded mushroom growers by *United Foods*, BellSouth should enjoy no First Amendment right to keep consumers in the dark.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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